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Supreme Court, U.S.
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No. 98-1055

In The

Supreme Court of the United States

October Term, 1998

AMELIA E. EDWARDS,

Petitioner,

v.

STEVEN M. CLARKE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Rhode Island

AMICUS BRIEF OF THE STATE OF RHODE ISLAND SUBMITTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari in the absence of a final judgment as required by 28 U.S.C. § 1257.

2. Whether this Court should entertain this Petition, which is an original filing between these parties, in light of the constraints on the Court's original jurisdiction.

3. Whether the Rhode Island Supreme Court possesses the inherent power to impose sanctions on attorneys who use language the court finds to be contemptuous, demeaning, intemperate and disrespectful.

4. Whether the request by an opposing party for attorneys' fees constitutes notice sufficient for due process purposes, and whether Petitioner's failure to respond to that request and subsequent failure to file a Motion for Reconsideration of the sanctions imposed (as suggested by the Rhode Island Supreme Court), implicates the due process provisions of the Fourteenth Amendment of the United States Constitution.

5. Whether the Rhode Island Supreme Court's imposition of sanctions upon the Petitioner violated her First Amendment rights to free speech.

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INTEREST OF AMICUS

Pursuant to Sup. Ct. R. 37.4, the State of Rhode Island, through its Attorney General, respectfully submits this brief as *amicus curiae* in opposition to the Petition for Writ of Certiorari. The State has an obvious and significant interest in the issues presented herein. The ability of the Rhode Island Supreme Court, and all of the lower courts in this State, to maintain decorum and preserve the dignity of the court must be preserved.

STATEMENT OF THE CASE

The instant petition was spawned by the latest in a series of Rhode Island Supreme Court decisions discussing the powers and authority of the Rhode Island Ethics Commission (hereinafter "the Commission"). The Commission was created by an amendment to the Rhode Island Constitution in 1986. R.I. Const. art. III, § 8. Since that time, the scope of the Commission's authority has been the subject of vigorous debate. In 1992 and 1993, in response to advisory opinion requests from the Governor, the Rhode Island Supreme Court issued decisions outlining the Commission's power. *See In re Advisory Opinion to Governor (Ethics Commission)*, 612 A.2d 1 (R.I. 1992), and *In re Advisory from the Governor*, 633 A.2d 664 (R.I. 1993). There is presently under advisement a third request for an advisory opinion from the Governor, *In re Advisory Opinion from the Governor (Rhode Island Ethics Commission – Separation of Powers)*, Rhode Island Supreme Court 1887-572 M.P., argued on November 10, 1998.

In *Clarke v. Morsilli*, 714 A.2d 597 (R.I. 1998), the case that led to the present matter, Clarke, a respondent to an ethics charge, challenged the Commission's procedure, and won. The facts and travel, set out in detail in the Petition, do not bear repeating here. The Rhode Island Supreme Court's decision in *Clarke v. Morsilli* had a rippling effect, necessitating the dismissal of other cases pending before the Commission. Given the far-reaching impact, the Commission requested reargument before the Rhode Island Supreme Court. In that Petition for Reargument, the Commission's attorney employed extremely inflammatory language. Specifically, Petitioner wrote that:

> [T]he Opinion is a shocking display of judicial indiscretion. It demonstrates judicial activism at its worst, in which the Court first determined what result it wished to reach and then squeezed its rationale to fit the result. The Opinion twists the facts and the law inappropriately to fit the result that the Court desired. In rejecting the Commission's agency interpretation, not only did the Court manage to fill the 8 page Opinion with factual errors . . . but it failed to apply its own well-settled precedent.

(Petitioner's Appendix at 3-4).[1]

Petitioner went further, highlighting for the Court the fact that one of its justices, while a private attorney in a similar case, had failed to make the argument pressed by the respondent (Clarke) in the pending case. (Pet. App. at 4). In a novel approach, Petitioner sought to have

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[1] References to Petitioner's Appendix are hereafter designated "Pet. App."

Justice Flanders vote to grant reargument by penning the following:

> As an attorney, Justice Flanders never questioned or challenged the Commission's interpretation as one would expect an attorney zealously representing his client to do.
>
> * * *
>
> Justice Flanders represented the sitting Secretary of State charged with ethics violations during a reelection campaign. Given what was at stake if the Commission found probable cause before the election, one would expect the sitting Secretary and her counsel to raise every jurisdictional, procedural or legal fight available. Notably, they did not raise the interpretation which this Court now finds so clear cut.

(Pet. App. at 4). Later in the Petition for Reargument, Petitioner wondered:

> [W]hy did Justice Flanders . . . fail to challenge or question the Commission's interpretation when representing public officials charged with ethics violations? How can it be that so many esteemed lawyers and public officials all failed to challenge the Commission's interpretation if the interpretation was so unreasonable? Yet . . . none of those other respondents challenged or questioned the Commission's interpretation.

(Pet. App. at 15-16). In addition, Petitioner wrote that "[e]ven more shocking this Court ignored the law in the cases cited by and relied upon by this Court in its Opinion." (Pet. App. at 13). Petitioner argued that the Court's analysis in *Clarke* was "backwards". (Pet. App. at 14).

Clarke's attorney objected to the Petition for Reargument. In his memorandum, he focused almost entirely on the disrespectful tone employed by the Petitioner. Clarke's response contained the following: "The only hearing that the Ethics Commission deserves is one of the award of attorneys' fees and sanctions. . . . " Clarke's counsel requested "that this Court award him his attorneys' fees incurred in defending this outrageous Petition to Reargue." (Pet. App. at 23, 25). That request for fees was dated July 23, 1998.

Petitioner did not respond to the request for attorneys' fees and sanctions. Two months later, on September 24, 1998, the Court issued an Order finding that the language of the memorandum was "contemptuous and demeaning." The Rhode Island Court noted that Petitioner's "offensive" language "undermines the efforts that this Court has initiated and encouraged in its attempts to promote civility in our courts." The Court then sanctioned the Petitioner in the amount of $1500, to be paid by counsel personally, and not by the Commission. (Pet. App. at 1, 2).

In response to that Order, Petitioner took the unusual approach of attempting to sway the Court's opinion via *ex parte* correspondence rather than a motion to reconsider. (State's Appendix at 1-4).[2] In response, the Court issued an Order on October 30, 1998, inviting her to file a Motion to Reconsider. (State App. at 5).

She declined, instead choosing to request certiorari from this Court. At this juncture, a procedural anomaly

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[2] References to the Appendix to the State's Amicus Brief are hereinafter designated "State App."

should be highlighted: at no time did Petitioner ever seek to intervene or be substituted as a party in *Clarke v. Morsilli*. Petitioner has never been a party to that case. Throughout the proceedings, Petitioner has been the attorney of record for the Commission. In order to file a Petition seeking the review of this Court, Petitioner merely inserted her name on the cover of the Petition. This is the first filing between these two parties, Amelia Edwards and Steven Clarke.

SUMMARY OF ARGUMENT

The instant Petition has two fatal procedural flaws. First, Petitioner appears to have invoked the Court's original jurisdiction by unilaterally inserting her own name as the Petitioner, without leave of any Court to do so. Next, the Order Petitioner seeks to have reviewed by this Court is not a final judgment within the meaning of 28 U.S.C. § 1257. The Rhode Island Court did not intend the September 24, 1998 Order to be final, since it invited Petitioner to request reconsideration by Order dated October 30, 1998. This Court should decline to issue certiorari, and instead allow the Rhode Island courts to fully and completely resolve this dispute.

Further, the Petitioner has not even attempted to show a split in the circuits or in the courts of the states which necessitates a review by this Court. To the contrary, as this Honorable Court knows and as the Attorney General will demonstrate, courts in every jurisdiction possess the inherent ability to sanction attorneys who use contemptuous and demeaning language within the confines of the judicial process.

It is clear that the Rhode Island Supreme Court acted well within its inherent powers in imposing sanctions considering the impudent and offensive language contained in Petitioner's memorandum. Further, the Court should decline to grant certiorari, since Petitioner in fact received notice that Clarke's attorneys were seeking attorneys' fees and sanctions. That is all the notice that the Due Process Clause of the Fourteenth Amendment requires. Likewise, the imposition of sanctions to preserve the dignity of the court did not violate the Petitioner's right to free speech.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI.

Rule 10 of the Supreme Court Rules provides that a writ of certiorari is a matter for judicial discretion, and will be granted only for compelling reasons. Rule 10 emphasizes that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Petitioner does not even attempt to demonstrate a compelling reason for this Court to undertake a review of the Rhode Island Supreme Court's imposition of sanctions. Instead, she leaps over that hurdle, and others standing in her way (discussed *infra*), launching directly into her arguments on the merits.

There is no reason for this Court to grant Petitioner's application for a writ of certiorari, as the decision of the

Rhode Island Supreme Court does not create such a conflict that the intervention of this Court is necessary. Further, the Rhode Island Supreme Court was clearly acting within its power when it imposed sanctions upon the Petitioner, and did not violate either her First or Fourteenth Amendment rights.

II. THE MATTER IS NOT RIPE FOR CERTIORARI, SINCE THERE IS NO FINAL JUDGMENT.

Under 28 U.S.C. § 1257, this Court's review of state court decisions, whether by appeal or certiorari, is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Thus the first jurisdictional prerequisite of Section 1257 is a "final" judgment or decree by the highest state court respecting the federal question. The general rule is that to be reviewable, the state court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *It must be the final word of a final court.*" *Market Street Ry. v. Railroad Comm'n*, 324 U.S. 548, 551, *reh'g denied*, 324 U.S. 890 (1945) (emphasis supplied).

Petitioner seeks to have this Court review an Order of September 24, 1998, wherein the Rhode Island Supreme Court denied a Petition for Reargument and imposed sanctions. Thereafter, Petitioner, via an *ex parte* communication to the Court, requested that the sanctions be reconsidered. (State App. at 4). In response, the court issued an order on October 30, 1998, advising Edwards that it was unable to consider the communication, but

inviting Edwards to file a motion to reconsider.[3] (State App. at 5). Petitioner declined the Court's invitation. Clearly under these particular circumstances, the Rhode Island Supreme Court did not consider the September 24 Order to be "final", and neither should this Court.

III. THE COURT SHOULD DECLINE TO EXERCISE WHAT AMOUNTS TO ORIGINAL JURISDICTION IN THIS MATTER.

This Court has original jurisdiction only in specific instances. Article III, Section 2 of the United States Constitution provides that:

> In all Cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.

Congress further defines this Court's jurisdiction in 28 U.S.C. § 1251, providing exclusive original jurisdiction only in controversies between states. This Court also has original, but not exclusive, jurisdiction in matters involving certain officials.

Since the first pleading with the caption *"Edwards v. Clarke"* is the instant Petition, and since the Petitioner has

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[3] Petitioner creates some confusion, because neither the Petition nor the Appendix filed in this case do not conform to the Rules of this Court. Rules 14(1)(e)(ii) and 14(1)(i)(iii) require that petitioner cite to and reprint any order "respecting rehearing". Petitioner omitted any reference to the October 30, 1998 Order, and did not reprint the one page Order in the Appendix. (State App. at 5).

not cited any authority granting original jurisdiction to this Court, certiorari should not be granted.

IV. THE RHODE ISLAND SUPREME COURT'S IMPOSITION OF SANCTIONS ON THE PETITIONERS WAS REASONABLE, APPROPRIATE, AND CONSTITUTIONALLY PERMISSIBLE.

A. The Rhode Island Supreme Court has the Inherent Power to Sanction an Attorney for the use of Disrespectful and Insulting Language in a Brief Aimed at the Court and its Members.

Petitioner argues that the Rhode Island Supreme Court has no standard of conduct for attorneys and that she did not know that the inflammatory language contained in the Petition to Reargue could possibly result in sanctions. (Petition at 8-9, 17-19). Petitioner overlooks the long line of cases which give the Rhode Island Supreme Court the inherent power to fashion a remedy when there is a wrong, and either ignores or overlooks the behavioral requirements imposed upon all counsel who practice in the State of Rhode Island.

The general powers of the Rhode Island Supreme Court were provided by the State legislature in R.I. Gen. Laws § 8-1-2 and § 8-6-1. Separately or together, these statutory provisions amplify the inherent power of the Rhode Island Supreme Court to sanction offensive conduct. In *Vincent v. Musone*, 574 A.2d 1234 (R.I. 1990), the Supreme Court imposed sanctions in the nature of counsel fees and expenses. In its decision, the court explained that such an award was not pursuant to Rule 11 of the Superior Court Rules of Civil Procedure. Rather, counsel

fees and expenses were awarded pursuant to the exercise of the court's "inherent power to fashion an appropriate remedy that would serve the ends of justice." 574 A.2d at 1235. These inherent powers have been apparent since long before the Petitioner became engaged in the practice of law. *See E.G. Hyde v. Super. Ct.*, 28 R.I. 204, 66 A.2d 292 (1907); *E.M.B. Associates, Inc. v. Sugarman*, 118 R.I. 105, 372 A.2d 508 (1977); *Cheetham v. Cheetham*, 121 R.I. 337, 397 A.2d 1331 (1979); *State v. Saback*, 534 A.2d 1155 (R.I. 1987); *Audette v. Coletti*, 539 A.2d 520 (R.I. 1988); *Vincent v. Musone, supra;* and *JEM Co. v. Fairway Capital Corp.*, 678 A.2d 1247 (R.I. 1996). Likewise, Rhode Island courts require attorneys to behave themselves when representing their clients. The Preamble to Rhode Island's Rules of Professional Conduct clearly states:

> [A] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Likewise, Petitioner has agreed to "speak and write civilly and respectfully in all communications with the court." Appendix "C" to Rhode Island Rules of Professional Conduct.

The well-established law in this country is that attorneys are expected to contain themselves within certain behavioral boundaries. The Rhode Island Supreme Court has always been mindful of the fact that vigorous advocacy is essential to our system of justice, but has cautioned that "[c]harges recklessly made against the court are not entitled to the protection of the right to advocate. There is no right to advocate untruth. There can be no

right in the name of advocacy to conjure up imagined wrongs and sling them with nothing but vindictive purpose." *In re Troy*, 43 R.I. 279, 290-91, 111 A. 723 (1920); *accord United States v. Cooper*, 872 F.2d 1 (1st Cir. 1989).

The cases cited by the Petitioner involve findings of contempt or sanctions pursuant to particular procedural rules, clearly distinguishable from the present case. The First Circuit has cautioned that "an attorney is not free to say literally anything and everything imaginable in a courtroom under the pretext of protecting his clients' rights to a fair trial and fair representation." *United States v. Cooper, supra*, citing *In re Little*, 404 U.S. 553 (1972); *Bar Ass'n of Greater Cleveland v. Carlin*, 67 Ohio St. 2d 311, 423 N.E.2d 1126 (1978); *In re Paulsrude*, 311 Minn. 303, 248 N.W.2d 747 (1976). Nor may an attorney seek refuge within his own First Amendment right of free speech to fill a courtroom with a "litany of speculative accusations and insults." *United States v. Cooper*, 872 F.2d at 3.

In vacating disciplinary action taken against the attorney in *United States v. Cooper, supra*, the First Circuit nonetheless issued this stern warning:

> We conclude this saga with an emphatic reminder to counsel that they indeed are subject to disciplinary sanctions . . . when their behavior in the course of representing a client offends these professional standards. We do not endorse the notion that an attorney can do or say anything and everything imaginable within the course of client representation under the guise of vigorous representation of his client.

872 F.2d at 5.

Spencer v. Dixon, 290 F.Supp. 531 (W.D.La. 1968), discussed the inherent power of the Federal Courts to command respect and impose decorum within their courtrooms. That court recognized that "all American and Anglo-Saxon courts of justice are vested by their creation with full power to impose silence, respect, and decorum in their presence by direct contempt authority. This authority is inherent and its existence essential to the preservation of law and order in judicial proceedings." 290 F.Supp. at 537. In *Ex Parte Terry*, 128 U.S. 289 (1888), this court acknowledged the rule:

> [O]f almost immemorial antiquity and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempt which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the Law. Blackstone thus states the rule: 'if the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.'

Petitioner cites with approval this Court's opinion in *Chambers v. NASCO*, 501 U.S. 32, *reh'g denied*, 501 U.S. 1269 (1991). *Chambers* supports the imposition of sanctions against the Petitioner, in that it unequivocally recognized the inherent ability of courts to "fashion an

appropriate sanction for conduct which abuses the judicial process." 501 U.S. at 44, 45. In this case, the Rhode Island court used its discretion, and the remedy fashioned was quite mild – attorneys' fees. The Court could have held Petitioner in contempt or, in light of her failure to abide by the Rules of Professional Conduct, could have initiated disciplinary proceedings. The First Circuit routinely awards costs to appellants, with little fanfare. This Court's statement in *Chambers* sums it up:

> The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses causes by his opponent's obstinacy.'

501 U.S. at 46 (quoting *Hatto v. Finney*, 437 U.S. 678, 679 (1978)).

It is entirely appropriate for the Rhode Island Supreme Court to expect a heightened standard of conduct from its attorneys. *Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290 (5th Cir. 1997) (upholding sanctions imposed for "abusive, profane, and pugnacious behavior"). Counsel never have the right to let their temper, zeal or intention lead them into disrespectful, accusative language to the court. Courts must of necessity maintain order and decorum in their presence. The fact that court and counsel disagree as to a ruling is no occasion for flagrant and open defiance of the court's authority. *See MacInnis v. United States*, 191 F.2d 157 (9th Cir. 1951).

Both state and federal courts have recognized the inherent power to impose sanctions on litigants and attorneys in order to regulate their dockets, promote judicial efficiency, and deter frivolous filings. *See Charczuk v. Commissioner of Internal Revenue*, 771 F.2d 471 (10th Cir. 1985) (imposing sanctions for bringing frivolous, unreasonable and vexacious proceedings); *State v. Caffrey*, 70 Wash.2d 120, 422 P.2d 307 (1966) (upholding a contempt finding after statement "if you can call it a courtroom" was uttered in open court); *Matter of Frerichs*, 238 N.W.2d 764 (Iowa 1976) (upholding disciplinary action against an attorney because of the likely effect of his behavior on the public's belief in the integrity of the court as an institution); *In re Buckley*, 10 Cal.3d 237, 514 P.2d 1201, 110 Cal. Rptr. 1, 121 (1973) (sanctioning attorney using the Court's inherent power). It is clear that the Rhode Island courts possess the inherent power to sanction language such as that employed by the Petitioner. There is thus no reason to grant certiorari.

B. A Request for Attorneys' Fees Contained in a Pleading is Sufficient Notice for Due Process purposes.

Petitioner repeatedly laments that the sanctions at issue were imposed without notice and opportunity to be heard. (Petition, at pgs. 6-7, 8, 9, 13, 19 and 21). Nowhere in the Petition does she acknowledge that Clarke's attorney twice requested that the Rhode Island Supreme Court award attorney's fees. (Pet. App. at 23, 25). Nor does she explain her inaction in the face of that motion or her silence following the October 30, 1998 Order.

Due process is a flexible concept, and the particular procedural protections vary, depending upon all the circumstances. The basic requirements of due process with respect to the assessment of costs, expenses, or attorneys' fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond. *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987), and cases cited therein. The instant Petition fails to state how the notice was deficient. Rather, Petitioner argues that she failed to receive notice and a hearing, as if repeating it often enough will make it so. It is beyond dispute that the motion asking for sanctions and attorneys' fees gave adequate notice for due process purposes. *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988); *Principle v. Assay Partners*, 586 N.Y.S.2d 182 (1992); *Mission Denver Co. v. Pierson*, 674 P.2d 363, 366 (Co. 1984); *In re Perry*, 918 F.2d 931 (Fed. Cir. 1990). There is no requirement that an evidentiary or other hearing be held before the imposition of sanctions. *Travelers Insurance Co. v. St. Jude Hospital of Kenner, La.*, 38 F.3d 1414 (5th Cir. 1994); *accord Muthig v. Brant Point Nantucket, Inc., supra*. The general rule is that the dictates of due process are satisfied where the sanctioned party has a real and full opportunity to explain the questionable conduct before sanctions are imposed. *See Kraszewski v. State Farm General Insurance Co.*, 130 F.R.D. 111 (M.D. Cal. 1984), and cases cited therein. In this case Petitioner had notice that the opposing attorney was seeking sanctions, and chose not to respond. The Supreme Court offered the opportunity to request a hearing on the issue. Again, Petitioner chose to remain silent, as did the attorney in *Kunik v. Racine County, Wis.*, 946 F.2d 1574 (7th Cir. 1991). As in *Kunik*, any procedural

omissions were the result of Petitioner's own inaction, and not of the court's making.

Petitioner herein explains her silence by arguing that there is no mechanism in the Rhode Island courts to respond to the pleading filed by Clarke's counsel. That argument lacks any vitality whatsoever. Although contained in an objection to a Petitioner for Reargument, Clarke's counsel clearly made a motion for attorneys' fees and sanctions. Under Rule 28 of the Rhode Island Rules of Appellate Procedure, a response to such a motion must be filed within ten days. Further, if there was any doubt in her mind, Rule 2 of the Rhode Island Rules of Appellate Procedure provides for their suspension for "good cause shown." This Rule would clearly have allowed her to file an Objection to the fee request. Nothing can excuse or explain such inaction.

This court has stated that the requirement of due process of law is applicable to a proceeding to impose sanctions, thereby entitling a party or attorney to notice and opportunity to respond, *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). However, the right to a hearing in these circumstances is obviously limited to cases where such a hearing could assist the court in its decision. Whether a sanctioned attorney acted in good faith is not material if the conduct was objectively unreasonable. *Kapco Mfg. Co. v. C & O Enterprises*, 886 F.2d 1485 (7th Cir. 1989). Where the sanctionable conduct occurred in documents filed with the court, there are no issues that a hearing could illuminate, and hence, the hearing would be pointless. *Kapco, supra; MacInnis v. United States*, 191 F.2d at 160; *Hill v. Norfolk and Western Ry.*, 814 F.2d 1192 (7th Cir. 1987).

Since the request for attorneys' fees and sanctions was contained in a pleading filed with the Rhode Island Supreme Court and served upon the Petitioner, the notice requirements of due process were satisfied. *In re Perry, supra; Braley v. Campbell, supra; Mays v. Chicago Sun-Times,* 865 F.2d 134, 139, n.3 (7th Cir. 1989). Having been clearly on notice, and having twice been given and twice declined an opportunity to be heard, Petitioner cannot now be heard to complain of lack of due process. *In re Perry,* 918 F.2d at 935. Nor was an evidentiary hearing required, since the sanctioned conduct consisted of written statements filed with the Court. The conduct was objectively unreasonable, and no hearing was required. Certiorari should not be granted.

C. The Imposition of Sanctions for Disrespectful and Insulting Language in a Brief Aimed at the Court and its Members Does Not Violate the Petitioner's First Amendment Rights Guarantees of Free Speech.

Petitioner relies on Justice Kennedy's plurality opinion in *Gentile v. State Bar of Nev.,* 501 U.S. 1030 (1991) in support of her argument that the Rhode Island Supreme Court's action violated her right to free speech. *Gentile's* plurality opinion does not compel the grant of certiorari in this case.

In *Gentile,* an attorney was disciplined for holding a press conference following his client's indictment on state criminal charges. The statements made during that press conference were extremely critical of the Las Vegas Police Department and District Attorney's Office. The Nevada Supreme Court had a rule limiting the public statements

that could be made by a trial attorney regarding a pending criminal matter.

In reversing the disciplinary action taken against the attorney, a majority of this Court nonetheless recognized that during a judicial proceeding, whatever right to free speech an attorney has is "extremely circumscribed." 501 U.S. at 1071. This Court cited with approval *In re Cohen*, 7 N.Y.2d 488, 495, 199 N.Y.S.2d 658, 661, 166 N.E.2d 672, 675 (1960), as recognizing the "long-established principle" that a lawyer:

> [a]s a citizen could not be denied any of the common rights of citizens, but he stood before the [court] in another quite different capacity, also. As a lawyer he was 'an officer of the court, and, like the court itself, and instrument . . . of justice . . . ' (citation omitted).

This court in *Gentile* reminds us all that "speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press", since "[l]awyers representing clients in pending cases are key participants in the . . . justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." 501 U.S. at 1074.

The disciplinary action taken in *Gentile* was reversed, since this Court categorized the speech at issue as classic political speech directed at public officials and their conduct in office. The same cannot be said of Petitioner's statements herein. The Constitution does not give attorneys the same freedom as participants in political debate. *Gentile, supra; Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995).

Petitioner's statements were made not in a public or political forum, but in a memorandum addressed to the Court advocating her client's position. As in *Spencer v. Dixon, supra,* Petitioner has cited to "no case of any appellate tribunal or court of original jurisdiction which ever has interdicted as unconstitutional the contempt authority of a court to punish irrelevant, insulting, abusive, or grossly discourteous language in criticism of a judge or officer of the court in a pleading filed with the court." 290 F.Supp. at 537. Such language contains "no constitutional protection and so has been held by definitive opinions of appellate tribunals, especially by the Supreme Court of the United States." 290 F.Supp. at 537 (quoting *In re Sawyer,* 360 U.S. 622 (1959) and *Fisher v. Pace,* 336 U.S. 155 (1949). In finding the complaining attorney in contempt of court, the court in *Spencer v. Dixon, supra,* noted that "[n]o court has suggested that judges are without authority to control scurrilous and defamatory pleading content, as respects duly constituted members of the judiciary, State or Federal." 290 F.Supp. at 538.

Other courts have rejected the argument that sanctions imposed on an attorney for language used during a judicial proceeding violated the free speech rights of the attorney. *See Carroll v. Jaques Admiralty Law Firm, supra; Attorney Grievance Commission v. Alison,* 317 Md. 523, 565 A.2d 660 (1989); *State v. Bomer,* 162 S.W.2d 515 (Tn. 1942), *cert. denied,* 318 U.S. 771 (1943); *Matter of Frerichs, supra.*

It is clear that the Petitioner was appropriately sanctioned for her criticisms of the Rhode Island Supreme

Court and its justices. Since her First Amendment rights were not implicated, certiorari should be denied.

V. CONCLUSION

The Rhode Island Supreme Court exercised its inherent power in sanctioning Petitioner for the language contained in her memorandum. Since Petitioner had notice that sanctions were requested by opposing counsel and could have explained her conduct but chose not to do so, there was no due process violation. Finally, the imposition of sanctions did not violate Petitioner's First Amendment right to freedom of speech. The courts of the State of Rhode Island must retain the power and authority to demand that attorneys behave in a professional manner. Petitioner seeks to eliminate that power. This Court should decline Petitioner's invitation, and refuse to grant certiorari.

Respectfully submitted,

State of Rhode Island
By Its Attorney

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APPENDIX

YESSER
GLASSON
& DINEEN

October 24, 1998

Counselors at Law

The Honorable Joseph R. Weisberger
The Honorable Victoria Lederberg
The Honorable John P. Bourcier
The Honorable Robert G. Flanders
The Honorable Maureen McKenna Goldberg
Rhode Island Supreme Court
250 Benefit Street
Providence, RI 02903

Re: Clarke v. Morsilli, et al.
C.A. No. 98-110-M.P.

Dear Justices:

On September 24, 1998, this Court issued an Order (the "Order") denying the Rhode Island Ethics Commission's (the "Commission") Petition for Reargument (the "Petition") in the above-referenced case. I respectfully request that this Court rescind the Order except for the portion which denied the Commission's Petition. In the alternative, I ask that the Court amend the Order to rescind the attorneys' fees and delete any reference to Katherine Tammelleo. I make these requests personally and not in my role as Legal Counsel to the Commission.

My reasons for this request are as follows: I filed the Petition on behalf of the Commission pursuant to Supreme Court Rule of appellate Procedure 25. As this Court held in *Brimbau v. Ausdale Equipment Rental Corp.*,

120 R.I. 670, 389 A.2d 1254 (1978), the purpose of a petition for reargument is to provide a petitioner the opportunity to address matters which the petitioner believes the Court misapplied or overlooked. The Petition which I filed did just that. I have taken full responsibility for the Petition. Ms. Tammelleo did not sign the Petition. She should not have her reputation suffer because her name happened to be included with mine in the Petition.

The Petition was not intended to be demeaning to or contemptuous of the Court. Rather, the Petition used strong, forceful, and pointed language to emphasize the serious consequences of this Court's July 17, 1998 Opinion. The language used in the Petition was similar to language used by other attorneys in recent filings with the Court which passed without rebuke or even comment, let alone the imposition of a monetary sanction. By way of example, in a Brief filed with this Court, appellant's counsel said the following about the trial court:

"These findings [by the court] are indeed startling, because they are so patently and demonstrably erroneous."

"Further, this brief will demonstrate that the court's finding . . . is quite farcical."

"The court's reasoning, moreover . . . appears especially contrived."

" . . . the court's reasoning is self-contradictory . . . "

"This charge [by the court] entails an odious assault [on an attorney], a result the court could only reach by ignoring the factual record before it."

"The court's claim is . . . preposterous . . . "

"The trial justice's misapprehension of the nature of the issue before him is manifest from the record and from the rulings. . . . "

This language is as strong and forceful, if not more so, than the language in the Petition. Yet, this Court in its decision of the matter above did not even mention the pointed attack on the judiciary as a matter of concern. Thus, in one instance, the Court accepted such language without comment and, in another instance, the Court penalized the attorney with monetary sanctions for the use of such language.

In addition, given the language used by this Court in the Order, it appears that the Court sanctioned me for contempt but ordered me to pay attorneys' fees. That being the case, the Court found me in contempt and imposed a monetary fine without a hearing or even notice. The Court's action raises serious constitutional problems. By failing to provide me with any notice, hearing or warning and by failing to reference the rule or standard which the Court claims I violated, the Court violated my right to due process. Additionally, the Court has chilled legal counsels' willingness to zealously advocate on behalf of clients. Finally, the Court awarded attorneys' fees of $1,500, a substantial fee, without any affidavit or other evidence to support the attorneys' fees ordered.

I do not intend by this letter to further antagonize this Court. I simply wish to address the legal implications of this Court's Order. For the reasons stated herein, I respectfully ask that the Court rescind the entire Order except for the portion of the Order which denied the Petition. In the alternative, I ask that this Court amend

the Order to rescind the attorneys' fee award and delete any reference to Katherine Tammelleo.

Very truly yours,

/s/ Amelia E. Edwards
Amelia E. Edwards

Supreme Court

No. 98-110-M.P.
(PC 96-4217)

Steven M. Clarke :
:
v. :
:
Richard Morsilli et al. :

ORDER

Subsequent to the denial by this court of a petition for reargument, Amelia E. Edwards, Attorney at Law, attorney for the petitioner mailed a letter to the justices of this Court asking for certain relief on her own behalf and on behalf of Attorney Katherine Tammelleo.

This letter constituted an ex parte communication to the members of the Court which cannot be considered.

In the event that either counsel desires to seek relief from a prior order of this Court, such counsel should file a petition in accordance with the provisions of Rule 18 of the Supreme Court Rules of Appellate Procedure. Such a petition should be filed with the clerk and copies should be sent to counsel of record for the opposing party.

Entered as an Order of this Court this 30th day of October 1998.

By Order,

/s/ Michael Cafferty
Clerk